AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

Submission to the post-implementation review of parts of the Fair Work Amendment Act 2013

October 2015

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for more than 97 years, AMMA's membership covers the entire resource industry value chain: exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to those industries.

AMMA's dedicated work is to ensure that Australia's resource industry is an attractive and competitive place to invest and do business, employ people and contribute valuably to Australia's well-being and living standards.

The resource industry is and will remain a major pillar of Australia's economy. The sector directly contributed $155 billion to Australia's GDP in 2013-2014 and, factoring in the full direct and indirect effects of resources activity, generates about 18 per cent of GDP in total. It is forecast that Australian resources will comprise the nation's top three exports in 2018-19.

AMMA members across the resource industry are responsible for a great deal of employment in this country. In 2013-2014, the industry directly employed 269,000 people in resources extraction and 190,000 people in resources-related construction and manufacturing – directly representing 4 per cent of total employment in Australia. When considering the flow-on effects of our sector, an estimated 10 per cent of the national workforce, or 1.1 million Australians, are employed as a result of the resource industry.

First published in 2015 by

AMMA, Australian Mines and Metals Association

Email: policy@amma.org.au

Phone: (03) 9614 4777

Website: www.amma.org.au

ABN: 32 004 078 237

TABLE OF CONTENTS

INTRODUCTION

1. AMMA welcomes the opportunity to respond to this post-implementation review of parts of the Fair Work Amendment Act 2013 which took effect on 1 January 2014.

2. This follows AMMA's input to the July 2015 post-implementation review of those aspects of the Amendment Act which took effect on 1 July 2013.

3. It is a regulatory requirement that the Federal Government undertake a post-implementation review of legislation where a regulatory impact statement is not issued at the time the legislation is proposed. This must occur two years after the commencement of particular provisions.

4. As a general principle, AMMA does not support prime ministerial exemptions from the requirement to issue a regulatory impact statement at the time legislation is enacted, such as happened with the enacting of the provisions of the Fair Work Amendment Act 2013.

5. AMMA and other employer groups also expressed considerable concerns with the process under which the 2009 Fair Work Act provisions were themselves progressed; concerns which we say have been borne out in practice as deficiencies in the Act have come to light that could have been identified and dealt with under a more typical consultative process.

6. Introducing the then-Fair Work Bill 2008 (which later became the Fair Work Act 2009), then Deputy Prime Minister Julia Gillard said:

> *"Reflecting the Government's commitment to co-operative workplace relations, this Bill is the product of an unprecedented degree of consultation with employer and employee representatives and State and Territory governments."*

7. This is not a perspective shared by employers, and the introduction of the subsequent amending Acts under the previous Labor government also cannot be characterised in such glowing terms. AMMA repeats our previous observations that the Fair Work Act, and subsequent amending Acts under Labor, should have been subject to proper regulatory assessment.

8. That being said, this submission responds to the request for feedback to this post-implementation review of the 1 January 2014 Labor amendments.

9. AMMA notes that the first tranche of amendments contained within the Fair Work Amendment Act 2013 were those relating to:

a. Special maternity leave;

b. Concurrent parental leave;

c. The right to request flexible working arrangements; and

d. The right for pregnant workers to transfer to a safe job.

10. The second tranche of amendments through the Fair Work Amendment Act 2013, to which this submission responds, are those relating to:

a. Consent arbitration of dismissal-related general protections and unlawful termination matters;

b. Consultation about changes to working hours;

c. The modern awards objective in relation to penalty rates;

d. The anti-bullying measure; and

e. Union access to workplaces.

11. This submission focuses to a large extent on a key area of importance to AMMA members from an operational perspective - union access to workplaces (right of entry).

12. AMMA notes that this two-yearly post-implementation review is occurring at the same time as the Productivity Commission is preparing its final report to government on its review of Australia's workplace relations system.

13. In AMMA's original submission, and reply submission to the PC's draft report, AMMA has examined union access to workplaces and other areas covered in this submission in great detail, proposing an extensive suite of reforms that AMMA maintains are needed in these areas.

14. AMMA commends those submissions to this review.

UNION ACCESS TO WORKPLACES / RIGHT OF ENTRY

15. Union access to workplaces has consistently rated as one of the top, if not the top, concerns of AMMA members since the Fair Work Act took effect on 1 July 2009.

16. AMMA foresaw the problems that would be created by the 2009 and 2014 changes to union entry laws and called them out. But our concerns were not heeded, and we have since seen those problems come to pass.

17. The Fair Work Act's original changes in this area have only become more problematic for employers with the further expansive changes made to union access (right of entry) effective as of 1 January 2014.

18. Those changes fall into three main areas:

    a. Location of union interviews and discussions.

    b. Facilitation of accommodation and transport in remote areas.

    c. Frequency of entry for union discussions.

19. AMMA notes that the first two areas above of changes under the Fair Work Amendment Act 2013 were intended to be repealed by the Fair Work Amendment Bill 2014.

20. That Bill, in line with the *Coalition's policy to improve the Fair Work laws*, released in the lead-up to the 2013 federal election, sought to repeal the provisions relating to the location of union interviews and discussions and the facilitation of accommodation and transport in remote areas.

21. Unfortunately, in order to get any of that Bill through parliament, the government had to do a deal with Senate cross-benchers which saw the complete removal of the union access repeal provisions of the Bill. This was despite the government having a clear mandate to repeal those provisions by unambiguously signalling its intention to do so prior to the last federal election.

22. In addition to removing the 1 January 2014 Fair Work Act amendments relating to lunch rooms and remote sites, the above Bill also sought to amend the basis of entry for discussion purposes according to whether the union was covered by an enterprise agreement onsite.

23. If a union was covered by an enterprise agreement, it could have, under the Bill, continued to enter sites based on the current Fair Work Act rules. However, if a union was not covered by an enterprise agreement onsite, its officials would have to be invited in by a union member or prospective member to hold discussions. A new system of "invitation certificates" would have applied if an invitation was in doubt, had the Bill passed with those provisions intact. Unfortunately, that did not happen.

24. AMMA now looks to the current PC and to this post-implementation review to ensure such changes are enacted in future, along with further necessary reforms as outlined by AMMA in our submissions on these issues to date.

25. While the PC has made two draft recommendations regarding union access to workplaces, these do not go as far as the changes in the Fair Work Amendment Bill 2014, and do not go nearly far enough in relation to AMMA's suite of proposed reforms.

26. To be absolutely clear, AMMA considers the current union entry provisions of the Fair Work Act, which are the product of both the 2009 and 2014 amendments, to be flawed, unbalanced, open to abuse, and encouraging of disputes. Change in this area is desperately needed.

Location of union interviews and discussions

27. Schedule 4 of the Fair Work Amendment Act 2013, which became the new s492 of the Fair Work Act on 1 January 2014, states that a union permit holder must conduct interviews or hold discussions in the rooms or areas of a premises agreed with the occupier.

28. If the permit holder and occupier cannot agree on a location, the lunch room or crib room becomes the default meeting place.

29. This means that under the current legislation, it is no longer permissible for employers to designate a reasonable onsite meeting place for unions to hold discussions with employees under s484 of the Fair Work Act. This represents a huge winding back of employers' control of third-party intrusion onto their premises that existed prior to 1 January 2014, and which was working appropriately and without disputes and queries in most situations (it should be noted, however, that this was in the context of a vastly increased number of entry requests to resource industry workplaces on the back of the Fair Work Act coming into effect on 1 July 2009).

30. Under the pre-1 January 2014 legislation, employers were able to designate "reasonable" meeting locations, which could be challenged by unions on the grounds they were not fit for purpose.

31. Key among AMMA members' concerns with how these 1 January 2014 changes are playing out is freedom of association and the need to protect employees who have no desire to meet with unions during their meal breaks.

32. Since their introduction, AMMA has seen first-hand the observable effects of those lunch room changes, key of which have been a significant increase on the regulatory burden for employers and occupiers and an intrusion into employees' private time.

33. The lunch room provisions are a major issue for employers and, in the past 18 months of operation, have caused substantial diversion of time and financial resources, above that which must always be devoted to facilitating union choices to enter worksites under our workplace relations laws.

34. The case law is still playing out in this area in terms of how it is to be decided exactly which lunch room unions have access to and exactly what constitutes a failure of an employer and union to agree on a location in the first instance. This is illustrative of the type of concern that could have been addressed were the 2014 amendments not rushed through.

35. While the legislation does not require unions to be given access to every single lunch room on a worksite, that is exactly how unions are interpreting it and that is how they are approaching employers in the resource industry when seeking to hold discussions with employees.

36. AMMA's primary position remains that the 2014 amendments under examination in this review should be reversed. Removing the latest changes would be a return to a relatively settled area of law (although by no means ideal) and would mean less uncertainty for the parties involved and less resources required to be expended by employers.

37. AMMA maintains that allowing the employer to designate a reasonable location would be a return to a system that incurred fewer disputes and entailed less uncertainty, but importantly had an avenue for a union that felt aggrieved or unduly restricted in meeting with employees to seek redress through the FWC.

Absence of agreement

38. The new s492 of the Fair Work Act states that the permit holder must conduct interviews or hold discussions in the rooms or areas agreed with the occupier of the premises.

39. However, in the event that a permit holder and occupier cannot agree on the room or area, the permit holder may conduct the interview or hold discussions in any room:

a. In which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and

b. That is provided by the occupier for the purpose of taking meal or other breaks.

40. While the legislation only affords access to a lunch room in the absence of agreement between the parties, unions are commonly not even trying to reach agreement or discuss an alternative location.

41. They are going straight onto resource industry worksites and saying 'we've got a legislated right to use the lunchroom and we will not even entertain a discussion with you about an alternative location', even though that alternative may be even more fit for purpose and appropriate, and provide access to greater numbers of employees and potential union members.

42. Which particular lunch rooms the unions seek access to depends entirely on the purpose of their visit at the time – if they are embarking on a recruitment campaign they will want access to the greatest number of employees that are not their members, often afforded by access to the main lunch room.

43. If they are there for bargaining purposes, they tend to want greater access to their existing members and will choose a location accordingly. If the entry is part of a more general campaign to cause workplace friction, they will choose the location that is the least convenient to the employer / occupier and most problematic and undesirable operationally.

44. To say that the current provisions are not furthering the aims of productive and co-operative workplace relations is an understatement, particularly with regard to the wishes of employees. The provisions have encouraged greater disputation and reduced consensus on the location of discussions, which is directly contrary to the principal objects of the Act and the emphasis on not only a "balanced framework" but also "co-operative" workplace relations.

45. It is most definitely not the case that the lunch room amendments have been successful in preventing disputation. That would be to misunderstand not only the effect of the Fair Work Amendment Act 2013's provisions but also their intention, which was always to give a leg up to unions in relation to their recruitment drives, and a right to force an outcome on employers (and to reward union belligerence about where discussions should take place).

46. Union access to workplaces is in many ways inherently confrontational. Union officials, when they come onsite, have a vested interest in creating the impression amongst employees that there is a problem and the employer is not doing the right thing by them.

47. Unions need to create problems in order to give themselves a theatre in which to demonstrate their wares and give the impression the employer is trying to hide something. This means that union permit holders' interactions with employer representatives, their own members and non-members are often confrontational and aggressive, and this is not something most employees want anything to do with.

48. As an aside, this belligerence and operating style is just one of the factors that has seen trade union membership in the private sector fall to just 11% on the most recent data[1].

Employee wishes being ignored

49. What should have been one of the most important considerations was strikingly absent from the flawed regulatory impact process for these amendments, namely what employees want. It is employees that are the targets of union recruitment drives and their preferences and interests should be properly taken into account.

50. Many of the complaints about the operation of the new lunch room provisions are coming from employees who want to have their lunch in peace and not be confronted by angry union officials.

51. Employers are often caught between the wishes of their own employees who do not want to buy what unions are selling and who ask their employer not to expose them to union propaganda, and the wishes of the union officials who insist on having access to any and all lunchrooms right off the bat (and are given an artificial leg up by unbalanced union entry laws).

Unique circumstances of the resource industry

52. Resource industry workplaces operate in very unique circumstances. Worksites can cover many hectares and there are often multiple different places where employees have their lunch. Those lunch places can be underground, above ground, even up in the air. In our industry, there will be all sorts of places where people have their lunch and unions are insisting upon access to them without considering the views of employees, the nature and management of the worksite, or the hazardous nature of access.

53. Employers can and do push back against union requests where such requests are not in line with the legislative provisions or would be dangerous to the permit holders or others. However, that does not stop union officials disputing those decisions and putting employers and occupiers to the time and expense of

[1] Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2014*, published on 27 October 2015, Catalogue number 6333.0

responding to Fair Work Commission (FWC) applications to resolve disputes over the correct interpretation of the new requirements.

54. A very serious issue raised by the current legislative provisions is the fact that some crib rooms are located underground or in other locations in which safety management is challenging, a foremost concern and tightly controlled.

55. While a number of AMMA members have managed to say those are not appropriate meeting places even in the face of union resistance, the legislation on the face of it empowers unions to access those rooms in theory even if not feasible in practice.

56. There are also legally controlled areas such as quarantine restrictions on several major resource projects which must be managed strictly in relation to each and every visit.

57. While AMMA by no means agrees this is the case, the legislation should not even arguably extend unions' "right" to enter workplaces to lunch rooms:

    a. on the "air side" of an airport, to which access is tightly controlled under aviation and national security legislation.

    b. in tightly security-controlled areas, perhaps for the manufacture, storage or use of explosives, cheque or note printing, or for the protection of secure data.

    c. Where there is no public access for very sound reasons (such as a women's refuge, mental health facility, prison, etc).

Operational impacts of lunch room provisions

58. Prior to the 1 January 2014 lunch room access provisions taking effect, there was already an onus on employers and occupiers to designate a reasonable meeting place that was fit for purpose. It was always open to unions to challenge the reasonableness of those locations, and the FWC could make orders that access be granted to particular rooms where warranted. AMMA can see no inherent unfairness in automatically returning things to the way they were.

59. In AMMA's, view the "reasonableness" test that preceded the 1 January 2014 changes was effective in that it ensured unions were not relegated to sauna-like facilities 10kms from where workers were located, but that employers could designate appropriate locations based on operational needs, employee convenience and comfort. To go to one of the preceding examples, in an airport or perhaps at the mint, the employer could designate a room for union meetings that did not raise security or operational concerns.

60. The employer / occupier is unquestionably best-placed to do this.

61. Where an employer was trying to game the system and manipulate the location to make it unattractive or inaccessible to employees, or was seeking to supervise or intimidate the union official, a complaint could be taken to the FWC.

62. The following actual experience applying the current entry rules amply demonstrates the operational difficulties and inherent problems with the current default lunch room provisions given that they divert valuable time and resources away from the business at hand and towards resolving such disputes because the legislation is open to interpretation.

Which lunch rooms are unions entitled to access?

63. In a real life example of union entry detailed in AMMA's reply submission to the PC's draft report, one AMMA member running a large mine site received a multitude of entry notices from numerous union officials in early 2014.

64. The union was, upon request, given access to the main crib room after which one of the workers complained their lunch break was disrupted by a union official talking loudly across the meal room (this is a not uncommon occurrence and as mentioned it is employees who often mostly strongly object to union proselytising during their meal breaks).

65. The union had previously objected to the meeting room the employer had designated and this had led the employer to give the union access to the main crib room in the employee amenities building. This was a meal room that fulfilled the requirements of the Fair Work Act under s.492.

66. Subsequent correspondence from the union demanded access to three other meal rooms on the site. When the employer refused, maintaining that the main crib room met the legislative requirements, the union raised a dispute under s.505 of the Act.

67. The employer maintained the main crib room was in fact the only meal room onsite that could be accessed by all employees and was therefore the most appropriate and amenable location for the union. Other crib rooms required employees to have specific area inductions (ie access was controlled for security, safety and operational reasons).

68. The main crib room was also the largest and best equipped facility for employee meal breaks onsite, comfortably seating more than 60 employees at a time.

69. All crib huts outside the main area complex required a visitor to be escorted and supervised at all times. The closest crib room was more than 300m from reception and required an escort across active roadways carrying heavy vehicles involved

in mining operations. That smaller crib room also had only three tables compared with nine tables in the main crib room.

70. The furthest crib room was more than 2km from reception and required motor transport through heavily utilised roadways adjacent to the open cut mine. An appropriately qualified and dedicated driver would be required to remain with the union officials (as with all other visitors) at all times, unlike in the main crib room.

71. Given that two union officials were visiting the site on an almost weekly basis for five hours each time, the resources required to escort and supervise those entries outside the usual arrangements would have been prohibitive and unreasonable.

72. There were also valid and specific operational and safety concerns raised by the union's demands to access the other crib rooms. In some cases those crib rooms were adjacent to heavy vehicle operations, active mining activities including blasting, areas where dangerous substances were being used, where exploratory drilling was taking place and in one case next to the primary explosives magazine.

73. In that particular case, the union threatened to take the matter directly to the Federal Court seeking an injunction to allow it access to all lunch rooms on the site, but this did not eventuate, presumably because the union did not want an adverse finding against it that would jeopardise future demands.

74. However, following the union's indication it would pursue court action, the business undertook a lot of preparatory work which involved third parties visiting the site, interviewing witnesses and preparing statements, becoming familiar with the facilities and company policies and drafting submissions.

75. A law firm was also briefed in anticipation of court proceedings.

76. Notwithstanding preliminary costs for the business of $30,000, the union simply did not proceed with the matter. As it turned out, the employees at that site voted to approve the employer's proposed enterprise agreement (which had been the purpose for the bulk of union visits) contrary to the union campaign against it.

77. Given the current legislation's openness to disputation, as the above example shows, AMMA maintains that the provisions implemented on 1 January 2014 requiring employers to facilitate union access to employee lunch rooms in lieu of agreement on another location are operating deficiently, represent a backward step from the previous regulation on union entry, and should be removed.

78. The pre-1 January 2014 provisions that allowed employers to designate reasonable meeting locations should be re-legislated and this would be very easy to do.

Refusals to reach agreement

79. A Qld-based AMMA member reports a distinct campaign by unions to access 25 smaller lunch rooms of various sizes across its plant rather than the one "canteen" lunch room.

80. That member reports that unions are deliberately creating a dispute and making no effort to agree on a reasonable alternative venue with the occupier.

81. To date, that member has given union officials access to seven different lunch rooms for the purpose of discussions with members in the context of upcoming EBA negotiations. Previously, unions might only have visited once every four or five months but during EBA negotiations that ramped up considerably.

82. In these cases, unions flatly refused to discuss alternatives and simply said access to any and all lunch rooms was their "legislated right".

83. The maintenance area of the plant, where some of the lunch rooms are located, is not the safest place to send visitors.

84. The company had been using an open air park onsite for the past six years for union meetings until the new laws came into effect on 1 January 2014. From then on, unions refused to use that outdoor space despite never having objected to it before.

85. At that single company, one person has had to devote an entire week of time recently to dealing with just one issue – union entry.

86. That company deals with three unions onsite who all want access to different crib rooms and each person visiting the site is required to have their own escort. That means if three officials come at once, three people are required to escort them.

87. These visits are all taking unnecessary time away from doing business, with onsite staff spending two hours on the phone every day for each union visit, not including other resources having to be devoted to such visits.

Examples of unsafe union behaviour

88. A recently published decision graphically demonstrates the scenarios that employers / occupiers are dealing with in terms of union visits to remote or inaccessible workplaces.

89. A case involving the CFMEU was subject to a decision by Commissioner Anna Booth in September 2014[2].

90. While the case was decided under s.505 of the Fair Work Act, contrary to the overwhelming majority of cases decided under that section, the dispute was not about the reasonableness of requirements to use particular rooms, the coverage of employees by a particular union or the right of entry provisions of industrial agreements. It instead concerned how particular named CFMEU officials should conduct themselves in future entry visits in light of past conduct.

91. Not related to the default lunch room provisions in particular, CFMEU officials were exercising their rights to enter to investigate alleged breaches under the Fair Work Act and the Qld Work Health & Safety Act as it stood at the time.

92. The FWC's decision demonstrates the types of behaviours employers and occupiers are having to deal with from union officials, all at a time when union access to all parts of a worksite, no matter how remote, is being expanded.

93. In this particular case, the CFMEU officials:

a. Avoided normal entry requirements that were in place for reasonable OHS purposes;

b. Walked on roads when it was dangerous to do so, including the heavy vehicle "haul road";

c. Left their escorts;

d. Conducted meetings at times and in places they were not authorised to do so;

e. Claimed to have permits they did not have;

f. Abused company employees;

g. Entered places without proper authority;

h. Entered places in dangerous ways; and

i. Removed protective equipment they were required to wear.

94. As the commissioner noted in her decision:

> *"The arrival, unannounced, of individuals at Curtis Island, a complicated construction site comprising three large, separate*

[2] *Bechtel Construction (Australia) Pty Ltd; Bechtel Australia Pty Ltd v CFMEU and Ors* [2014] FWC 5900, 18 September 2014

projects, whether by ferry or private vessel, is itself a major OHS issue. [The company] had every reason to know who is onsite and where they are to ensure safety."

95. The company's standard safety procedures included:

a. Travel to and from the mainland by ferry provided for the purpose of transporting employees and visitors;

b. Signing in and being issued with a visitor's pass at the security office at the ferry dock on the mainland;

c. Undertaking a visitor's safety induction at the ferry dock on the mainland;

d. Being ferried across, under escort, to the ferry dock at the QCLNG project on Curtis Island, where they are met by either a member of the company's workforce services team or another staff member;

e. Being required to wait in an office area until they are escorted to the areas of the project they wish to visit; and

f. Being escorted off the island and departing in the same way they arrived when they finished their visit.

96. Contrary to those requirements, which the commissioner found entirely reasonable, particular CFMEU officials were alleged to have:

a. Travelled to Curtis Island by private vessel, including skippering one of the journeys;

b. Failed to comply with OHS requests;

c. Walked on the haul road which the commissioner noted was "potentially dangerous and carries mainly heavy vehicles with strict controls over light vehicles entering the road, prohibited to pedestrian traffic and marked as such with signs";

d. Proceeded on foot into the construction site;

e. Walked unescorted and without authority to be on the site;

f. Conducted a meeting under s.484 outside of normal meal breaks;

g. Spoke on mobile phones contrary to good OHS practice;

h. Caused disruption by directing employees to cease work;

i. Examined a crane with the engine running;

j. Proceeded without an escort into areas where earthmoving was taking place in an unsafe way;

k. Ignored warnings and reasonable requests.

97. According to the commissioner, aspects of the union officials' conduct had "all the hallmarks of stunts".

> *"They were arranged by the CFMEU off the back of sub-branch meetings that brought a large number of officials to Gladstone. It seems no coincidence that amateurish entries were staged, one complete with private vessel, by officials who should have known better, conducting themselves unconventionally or even improperly."*

98. This type of behaviour, for which AMMA notes the punishment meted out by the FWC was that union officials undergo further training, underscores the need for the repeal of all of those aspects of the Fair Work Amendment Act 2013 that expanded union entry rights to areas of worksites not designated as appropriate by the employer, and to remote or inaccessible sites, as outlined further below.

Accommodation and transport in remote areas

99. Division 7 of Schedule 4 of the Fair Work Amendment Act 2013 enacted never before legislated provisions requiring occupiers to facilitate union officials' accommodation and transport arrangements to enable them to visit worksites in remote areas.

100. The types of sites potentially affected by those provisions include predominantly resource industry worksites not only in the middle of a body of water but also onshore in remote, desert-like locations, which are just as complex to manage from an operational perspective.

101. Under the new s521C(2) of the Fair Work Act, in situations where unions and occupiers are unable to agree on accommodation and transport arrangements, employers are required to facilitate access by providing said transport and accommodation.

102. Section 521D(1) of the Fair Work Act imposes an obligation on occupiers to provide the commercially available transport that it has arranged for its own workers and extend that to the union.

103. The plethora of safety issues associated with union access to remote sites includes that infrequent travellers require escorting on all offshore platforms and helicopters to ensure their safety at all times. This is a further distraction requiring extra resources to be diverted while at the same time opening up the occupier to significant risk and liability.

104. Offshore and onshore resource worksites in remote locations are often also major hazard facilities. Visitors are a liability in emergency response situations and this is something employers have to factor in for each and every workplace visit. They need to be especially vigilant regarding union visitors who often do not obey instructions and are prone to walking off on their own to investigate.

105. AMMA's submission to the Senate inquiry into the Fair Work Amendment Bill 2013 when it was before parliament outlined in detail AMMA's concerns about the remote site provisions.

106. While there has not been a large documented increase in requests for remote site visits via employer-facilitated transport and accommodation, AMMA and its members remain opposed to these provisions and maintain they should be removed in line with the government's pre-election policy, and as the Fair Work Amendment Bill 2014 in its original form sought to do.

Does the union have to pay?

107. In a recent example, union officials were seeking access to an offshore resource project in Western Australia.

108. Such a visit would have required by law an escort by the local port authority in addition to the company's site access requirements. The port authority would charge a fee for the escort.

109. The union maintained the company was required to pay that fee to facilitate the union's access to the offshore site. Nowhere in the legislation does such a requirement exist, but this demonstrates the lack of clarity around Labor's laws, including around the respective obligations on employers and unions, thus further supporting the removal of the provisions.

110. All the concerns AMMA predicted remain live considerations, and the relatively small number of official requests for transport and accommodation are more a function of scarce union resources, well-managed remote site operations and the significant fall-off of new resource project work than anything else.

111. AMMA maintains that union access to remote sites is impractical and often dangerous and that access to workers can easily be facilitated when workers are en route to those locations, such as at a heliport or wharf.

112. We also note there was to be an exchange of monies between unions and employers for said transport and accommodation where employers were providing their own transport and accommodation to union officials:

    a. There was discussion of the publication of a schedule of fees when the legislation was enacted by the former Labor government which has never

come to pass, and in relation to which there has never been any consultation with AMMA or other employers that we are aware of.

b. Employers were (and remain) very concerned at their capacity to recoup the full costs incurred in providing transport and accommodation to union officials.

c. It remains a concern that costs will be disputed by unions.

d. In the example referred to earlier, unions are sometimes attempting to insist that employers are required to foot the bill for their expenses incurred in relation to remote site visits.

e. We have seen during the course of the Heydon Royal Commission the risks and hazards that are created where unions and employers enter financial transactions and exchange monies. Our principal workplace relations legislation should not encourage or require unions and employers to financially transact with one another.

ANTI-BULLYING

113. The Fair Work Act's anti-bullying measure that took effect on 1 January 2014 introduced a new jurisdiction for the FWC to deal with bullying complaints.

114. The provisions apply to a worker who "reasonably believes" they have been bullied at work, allowing them to apply to the FWC for orders to stop the bullying.

115. If the FWC is satisfied the worker has been bullied **AND** there is a risk they will continue to be bullied, it can make an order to stop the bullying.

116. The FWC cannot order reinstatement, compensation or penalties associated with any initial applications. It can, however, refer matters to a work health and safety regulator where necessary and appropriate.

What is bullying?

117. The term "bullied" is defined in the new s789FD of the Fair Work Act, which says a worker is bullied at work if an individual or group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member, **AND** that behaviour creates a risk to health and safety.

118. "Reasonable management action" when carried out in a reasonable manner will not result in a person having been "bullied".

Powers and functions of the FWC

119. Within 14 days of receiving an application to stop the bullying, the FWC must start to look into the matter and can do so by:

    a. Taking steps to inform itself of matters under s590 of the Fair Work Act;

    b. Conducting a conference under s592; or

    c. Deciding to hold a hearing under s593.

120. The FWC can, as part of looking into the matter:

    a. Contact the employer or other parties to the application;

    b. Conduct a conference or hold a formal hearing; and

    c. Make a recommendation or express an opinion.

121. The tribunal can make any orders it considers appropriate to stop the bullying.

122. Orders will not necessarily be limited to or apply only to the employer but can also apply to co-workers and visitors to the workplace.

123. Orders can also be based on behaviour such as threats made outside the workplace if those threats relate to work.

Lower than expected number of applications

124. The number of applications brought under the new jurisdiction has remained consistently low since 1 January 2014 as the table below shows.

125. There has also been a negligible number of matters that have been subject to a published decision and an almost non-existent number of applications that have been granted in favour of an applicant.

	Jan-March 2014 quarter	April-June 2014 quarter	Jul-Sept 2014 quarter	Oct-Dec 2014 quarter	Jan-March 2015 quarter
Applications made	151	192	189	169	173
Decisions handed down	8	13	15	20	16
Applications granted	1	0	0	0	0

126. The above figures can hardly be said to justify the maintenance of an entire jurisdiction within the architecture of the FWC going forward.

127. As employers, including AMMA, have consistently recognised throughout debate leading up to the anti-bullying jurisdiction being introduced, and in subsequent workplace relations reviews, there are genuine and serious cases of workplace bullying that can cause significant harm to those involved as well as the businesses they work for.

128. Employers at the time maintained there were existing efforts under way in the workplace health and safety sphere to combat bullying which provided a superior and more effective foundation for action than artificially grafting this issue onto the FWC's jurisdiction. This remains the employer view – bullying is a workplace health and safety issue and any national response should come under the purview of the OHS system, not the workplace relations system.

129. The majority of the very few decisions to date that have been handed down under the FWC's anti-bullying jurisdiction have tended to deal with what might be described as personal grievances rather than genuine workplace bullying.

130. As AMMA has repeatedly said, employment protection measures, including those relating to bullying, must be balanced, proportionate, practical and navigable by employers.

131. There is little case law arising from the FWC's new anti-bullying jurisdiction that would assist employers in assessing their potential liabilities and obligations given that each published decision has involved very specific and unique circumstances, personalities and relationships and so the requirements for the jurisdiction are no clearer as a result.

132. It is therefore very difficult to assess the costs and impacts on a business, and to weigh this against the purported positive impact for employees alleging bullying.

133. AMMA continues to maintain that the Fair Work Act's anti-bullying legislation is wrongly-located in the workplace relations jurisdiction to begin with and is more properly the preserve of the workplace health and safety system.

134. Notwithstanding the lower than expected number of applications and orders in the first 18 months of the jurisdiction, or perhaps because of it, the jurisdiction remains an unnecessary extra mode of third-party interference for employers which has added little or nothing to existing protections for employees.

135. Although no monetary compensation is available, addressing concerns through FWC processes requires more time and resources from both employers and employees than it does to address them internally via company procedures.

136. A key part of AMMA's initial recommendations to the PC's review was that applicants should have to follow internal company processes first, where they exist, before taking an application to the FWC. AMMA strongly maintains that view.

137. AMMA notes that the *Coalition's policy to improve the Fair Work laws* in May 2013 stated that:

> *"The Coalition will therefore support the changes that Labor has proposed, subject to a worker first trying to seek preliminary help, advice or assistance from an independent regulator. If they have done this and their concerns remain unresolved, they will be free to make a claim to the tribunal. In addition, we will require that Labor's proposed changes are expanded to include union officials and their conduct towards managers, employers and workers."*

138. Having regard to a number of published decisions and the nature of the complaints made, it is clear that a process of seeking assistance from another agency or regulator would probably have meant that many applications would not have been made in the first place.

139. AMMA supports a proper independent triage process which would require an individual complainant to seek assistance, help or advice from an independent regulator prior to lodging a complaint with the FWC.

140. This should be a condition precedent for an applicant who would need to demonstrate they had sought external assistance first.

141. AMMA also supports, consistent with our previous submissions, the anti-bullying jurisdiction explicitly applying to union officials. If the jurisdiction is to remain (contrary to AMMA's position), the above policy commitments that have not yet been acted upon by the Coalition Government should be considered and progressed as soon as possible.

Emerging reluctance to manage performance

142. While the FWC anti-bullying jurisdiction's case law generates little in the way of lessons for employers, AMMA members report an emerging reluctance by line managers to appropriately discipline or performance-manage poor performers due to a fear of bullying claims being made in retaliation. Some managers fear personal orders or findings against them and this compounds their incapacity to do what the employer requires of them.

143. These trends are not necessarily reflected in the published data on applications to date but do warn of the deleterious impacts on business productivity that have arisen since the jurisdiction first took effect, the extent of which is hard to quantify.

144. AMMA fears the jurisdiction has done little to counteract real bullying, and its main impact lies in further tying employers' hands and preventing them from addressing genuine performance issues at the workplace.

145. AMMA maintains that the FWC should focus on its core area of business (workplace relations) without duplicating another already well-covered area of regulation in the form of workplace bullying and this should occur by:

a. Repealing the Fair Work Act's anti-bullying provisions that took effect on 1 January 2014 given there are already numerous other avenues in place, including under work health and safety laws.

b. In lieu of that, making it explicitly clear that bullying over an individual's participation or non-participation in union activities is not protected and is subject to the FWC's anti-bullying jurisdiction.

c. Clarifying in legislation that bullying conduct within what would otherwise be legitimate industrial activities is not protected. Bullying

conduct, regardless of the context, should remain actionable against the perpetrator.

146. On those last two points, AMMA laid out in great detail some very serious examples of bullying over union-related or industrial activities in its original submission to the PC's review of the workplace relations framework.

CONSENT ARBITRATION OF DISMISSAL-RELATED MATTERS

147. Other provisions of the Fair Work Amendment Act 2013 that took effect on 1 January 2014 allow the FWC to arbitrate dismissal-related general protections applications brought under s.365 of the Fair Work Act as well as unlawful termination claims brought under s.773.

148. With the consent of both parties, the above matters can be heard and arbitrated by the FWC rather than the Federal Court or the Federal Circuit Court. In the event that both parties do not consent, such matters (where they are arbitrated) are arbitrated by the courts.

149. Orders the FWC can make in relation to applications include:

a. Reinstatement;

b. Payment of compensation;

c. Payment for lost remuneration;

d. Orders to maintain continuity of a person's employment; and

e. Orders to maintain the period of a person's continuous service.

150. The amendments also limit appeals of FWC decisions in this area as well as allowing costs orders to be imposed.

151. There have been very few arbitrated outcomes under those provisions to date.

152. AMMA and its members were not strongly opposed to those provisions when the Fair Work Amendment Act 2013 went before parliament given that applications can only be heard with the consent of both parties, and it may in some cases be less expensive to have matters arbitrated by the FWC than the courts.

153. However, the FWC should provide further information in its annual reporting and potentially through Senate Estimates on the usage of these provisions and how they are operating. It may be that in time there should be an external review (undertaken externally to the FWC) of the experiences and impacts of such determinations on employers, employees and their representatives.

154. Generally speaking, AMMA is not supportive of increases in the FWC's jurisdiction going forward and has laid out in detail our view of what the employment tribunal architecture should look like.

CONSULTATION ABOUT CHANGES TO WORKING HOURS

155. From 1 January 2014, new content requirements for modern awards and enterprise agreements regarding consultation with employees took effect.

Consultation clauses in modern awards

156. Under the amendments, modern awards had to include a term requiring employers to genuinely consult with employees about changes to their regular roster or ordinary hours of work.

157. "Regular roster" was not defined, however, the requirements were not triggered where the employee had irregular, sporadic or unpredictable working hours. The obligations did, however, apply regardless of whether the employee was permanent or casual.

158. The award also had to allow for employees to be represented in consultations by an elected employee rep or union rep.

159. "Consultation" required the employer to:

    a. Give information to employees about the change;

    b. Invite employees to give their views about the impact of the change (including but not limited to the effects on their family and caring responsibilities); and

    c. Consider any views put forward by employees about the change.

160. All modern awards were varied to include the new consultation term, with those determinations taking effect from 1 January 2014.

Consultation clauses in enterprise agreements

161. Prior to 1 January 2014, all enterprise agreements had to include a term requiring the employer to consult about "major workplace changes that are likely to have a significant effect on employees".

162. That requirement was extended under the Fair Work Amendment Act 2013 to include an extra requirement to consult about a change to employees' regular roster or ordinary hours of work.

163. Employees were also entitled to be represented in relation to consultation over those issues by a union or employee rep.

164. Employers and employees were still able to negotiate a consultation term for inclusion in enterprise agreements but it had to accord with the amendments.

Impacts

165. As AMMA pointed out in its submission to the Senate inquiry into the Fair Work Amendment Act 2013 when it was still before parliament, this remains an area of concern for employers from a regulatory burden and productivity perspective. This was down to the fact that the provisions of the Amendment Act meant every change to a roster was a change that required consultation with the workforce and their representatives before a decision was made.

166. The essence of the Amendment Act's changes included:

a. Creating new obligations in awards and agreements for an employer to consult with employees on changes to rosters and hours of work;

b. Providing new rights of representation in regard to the new consultation arrangements; and

c. Creating new obligations to consider employee views on the impact of the changes upon them and their family commitments.

167. AMMA maintains there was no evidence of the need for further consultative provisions in enterprise agreements on top of what existed prior to 1 January 2014.

168. AMMA still considers that employers and employees and their representatives should be able to agree on such consultation at a workplace level rather than it being imposed on them through the agreement and award system. If parties are capable of reaching an enterprise agreement under the Fair Work Act, surely they are capable of agreeing on a consultation provision if that is a priority for them.

169. AMMA's view remains that workplace change should be a matter that can be addressed in agreements, subject to it being a permitted matter under the Fair Work Act, but that it should not be imposed on bargaining parties.

170. Among other things, changes to rosters are an operational decision and unless roster changes will have a major impact on employees, in which case they would be covered by the pre-1 January 2014 consultative provisions, there should be no strict requirement to consult as it unnecessarily increases the regulatory burden.

171. These provisions are also taking hold at the same time as resource industry rosters are coming under commercial, operational and logistical pressures, on top of

competing employee and union preferences on rosters and what constitutes "family-friendly" arrangements. The Amendment Act's provisions miss the point in this regard and do not help employers or employees deal with real productivity challenges being faced in workplaces today.